(2)

No. 09-681

FILED

In The

Supreme Court of the United States

ARMAND BONVICINO and DAVID BUELOW,

Petitioners,

v.

BRUCE HOPKINS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTHONY BOSKOVICH
BOSKOVICH & APPLETON
28 N. First Street, 6th Floor
San Jose, California 95113-1210
(408) 286-5150
policemisconduct@compuserve.com

Attorney for Respondent
Bruce Hopkins

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Is driving under the influence of alcohol properly deemed to be such a "minor" offense that entry into a residence under the exigency exception to preserve evidence of that offense can never be justified – even though the offense carries a penalty of up to six months in jail and the commission of the offense results in thousands of deaths every year?

2. If a citizen eyewitness makes a report to the police that, on its face, provides a fair probability that a person just committed a crime, are police required to conduct further investigation into that crime before they may enter a suspect's residence to prevent the imminent destruction of evidence of that crime?

3. In assessing the constitutionality of a warrantless entry into a residence by police to check on the condition of a person inside the residence, is a court prevented from placing any weight on the fact that the person inside has failed to answer the door because "nothing requires an individual to answer the door in response to a police officer's knocking"?

4. Does the pointing of a gun at an individual inside an unfamiliar residence prior to the apprehension of that individual for the commission of a crime constitute excessive force?

LIST OF PARTIES

Bruce Hopkins

Armand Bonvicino

David Buelow

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Bruce Hopkins respectfully requests that this Court decline to review the judgment and opinion of the United States Court of Appeals, in and for the Ninth Circuit, entered on 16 July 2009, in the above-entitled proceeding.

OPINIONS BELOW

Hopkins v. Bonvicino, et al., 573 F.3d 752 (9th Cir. 2009), reprinted in Petitioner's Appendix A.

Hopkins v. Bonvicino, et al., Unpublished Order (N.D. Cal. 2006), reprinted in Petitioner's Appendix B.

INTRODUCTION

"This is an odd flyspeck of a case." (*Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006) (*conc. opn. of* Stevens, J.) Petitioners come to this Court and ask it to take time from its busy docket to determine a very extreme and fact-specific situation. In a nutshell, Petitioners claim that California and even national law enforcement has become paralyzed because they can no longer make a warrantless entry into a home when a citizen makes a bald and totally – and in this case *totally* literally means *totally* – unsubstantiated claim of a hit and run accident with an inebriated driver. In the approximately ten minutes that Petitioners were present, they were told by a person

with a known motive to lie that there had been a minor "tap" at an intersection, but there was no physical evidence to corroborate that claim, and in fact there was no evidence nor the slightest investigation that any vehicle had even been driven much less involved in an accident. They were told that a phantom driver had smelled of alcohol, and staggered into a home, but there was no evidence that this driver even existed, much less had driven and was inside. From this, Petitioners opined in under ten minutes that there was a serious threat of a diabetic coma and broke into Respondent's home with guns drawn, allegedly in order to save him. Of course, arrest as opposed to rescue ensued. In Petitioners' view, these "facts", in reality a mere chimera, established ample probable cause and exigency rendering their actions *per se* reasonable, at a minimum entitling them to qualified immunity because three years later the California Supreme Court made a ruling that on its best day is distinguishable on its facts. Should this Court agree with Petitioners and grant the Writ, we might as well take an indelible marker and redact the Fourth Amendment from the United States Constitution because it will have no real practical effect, and Justice Scalia's promise that 42 U.S.C. § 1983 will protect us from police abuse, as outlined in *Hudson v. Michigan*, 547 U.S. 586, 596-99 (2006), will go unfulfilled via the immunity sought in this case.

The Petition must be denied.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals in and for the Ninth Circuit was entered on 16 July 2009, with a petition for rehearing being denied on 14 September 2009. Since the appeal in this case is from a denial of qualified immunity, the order is immediately appealable. (*Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985)) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondent Bruce Hopkins brought suit against Petitioners, as well as Officer Nick Nguyen and the City of San Carlos, California, on 19 July 2005 for violation of his civil rights arising out of the warrantless entry into his home with guns drawn by San Carlos police officers, with neither probable cause nor any exigency. He also made a claim against the City pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which was neither the subject of the appeal nor this Petition.

Petitioners filed a motion for summary judgment on the grounds that they are entitled to qualified immunity because, in their view, there was probable cause to enter Mr. Hopkins' home to arrest him for driving under the influence and "hit and run". They further argued that they were entitled to enter under the "emergency aid" exception. They finally argued

that pointing their guns at Mr. Hopkins did not constitute excessive force.

The trial court disagreed, finding that there were "disputed issues of material fact as to the state of Defendant Officers' knowledge at the time they arrived on scene . . . " and that "even if it were to accept all of the facts as true, there are insufficient facts on this record for the Court to conclude that the Defendant Officers are entitled to qualified immunity on the basis of the emergency exception to the warrant requirement." (Exhibit B to Petition, pp. 51a-52a) The court further found disputed issues of material fact regarding what the officers knew at the time of entry into the home with respect to the existence of probable cause to arrest Mr. Hopkins. (*Id.* at p. 53a) The court finally found disputed issues of material fact regarding the use of excessive force and that the law was clearly established at the time of the incident. (*Id.* at 53a-56a)

Petitioners appealed, now arguing in principal part, as they essentially do here, that the California Supreme Court's subsequent decision in *People v. Thompson*, 38 Cal.4th 811 [135 P.3d 3] (Cal. 2006), somehow unsettled the state of the law *post factum*, entitling the Petitioners to qualified immunity, and that this Court had created a rigid standard that any jailable offense abrogates the Fourth Amendment reasonableness requirement should the potential for destruction of evidence exist. In its unanimous opinion, the Ninth Circuit rejected that argument, instead reaffirming this Court's repeated teaching

that a warrantless entry into a person's home must be objectively reasonable under the circumstances. (See, e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)) The Ninth Circuit reversed as to Officer Nguyen, however, and dismissed him from the case.

This petition followed.

II. STATEMENT OF FACTS[1]

On 22 August 2003, at approximately 6:24 P.M., the San Carlos police received a call from Waheeda Talib, who claimed that she had been involved in an accident and that she had followed the driver of the other vehicle, later identified as Bruce Hopkins, to a residence. This was Bruce Hopkins' home. The dispatcher reported that Mr. Hopkins went into the house after a minor "415"[2], and appeared to have been drinking. Petitioner Armand Bonvicino and Officer Nick Nguyen drove the short distance from the police station in a normal manner and arrived 2 to 4 minutes later, and spoke with Ms. Talib. Ms. Talib stated that she and Mr. Hopkins were stopped at a red light, and that Mr. Hopkins moved forward

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[1] As opposed to the norm, a detailed version of the facts is presented because, in Respondent's view, given that the clear standard is one of reasonableness, and because this case comes to this Court early on from an interlocutory appeal from a denial of qualified immunity, it is critical that the Court understand the totality of the facts to assist it in application of the standard.

[2] This refers to California Penal Code § 415, commonly known as "disturbing the peace".

and hit the vehicle in front of him, and then backed his vehicle into Ms. Talib's vehicle, and that they then both got out of their vehicles. *Ms. Talib told the officers that there was no visible damage to her car, and that Mr. Hopkins had said the same thing at the scene of the accident.* She further stated that she and Mr. Hopkins argued, that Mr. Hopkins refused to admit his involvement in the accident, and drove away. Ms. Talib told the officers that she followed Mr. Hopkins to the home, that she had a confrontation with Mr. Hopkins there, and that he ran inside his house and did not come out despite her persistent knocking. Ms. Talib did not volunteer and the officers did not ask whether Mr. Hopkins' driving appeared impaired in any way on the drive home. Ms. Talib further stated that she smelled a strong odor of alcohol on Mr. Hopkins, and he appeared drunk. When asked if she needed medical attention, Ms. Talib said no, and she did not appear to be in need of any. Ms. Talib was angry and agitated, was raising her voice, and had a motive to lie because she claimed to have been in an accident in a rental car. She expressed no opinion or concern for Mr. Hopkins' health or well-being. Officer Bonvicino made no further inquiry into Ms. Talib's observations regarding Mr. Hopkins' medical status, her medical training, whether Mr. Hopkins was wearing a bracelet indicating that he was a diabetic, or whether the odor she smelled was of alcohol or the "sickeningly sweet" odor he had been trained would indicate a diabetic emergency. In fact, Officer Bonvicino did not believe that she had given him information that would lead

him to be concerned for Mr. Hopkins' medical condition at all. Officer Bonvicino made no inquiry into the mechanics of the accident, did not inspect the vehicles, and did not know if either vehicle was damaged in any way. In fact, there was no damage to either vehicle.[3]

Officer Bonvicino proceeded to go to the front door of the residence, and knocked on the door four times, announcing his presence. Each series of knocks was progressively louder. Officer Nguyen was standing by with Ms. Talib approximately 20 feet away from Officer Bonvicino. Getting no response, Officer Bonvicino left the front door[4] and proceeded to have a conversation with Officer Nguyen and Officer Buelow, who had arrived on scene. It was decided in that conversation that Officers Bonvicino and Buelow would attempt to make contact with Mr. Hopkins and that Officer Nguyen would investigate the accident. *Officer Bonvicino did not believe that based upon the*

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[3] Although Officer Nguyen stated in his report that there was damage to the vehicles, he could not identify the damage in his deposition from the photographs he took that day. The contemporaneous digital photographs, supplied to the trial court as well as the Court of Appeals on CD, speak for themselves, showing absolutely no damage, and thereby create a triable issue of fact.

[4] Mr. Hopkins testified that the officers must have attempted to kick the front door open because it was damaged, as well as a written complaint that the officers had attempted to enter through a screened window.

information that he had that there was probable cause to arrest Mr. Hopkins for anything.

Officers Bonvicino and Buelow proceeded to the right side of the house, and proceeded through a gate[5] into a side yard. Officer Bonvicino proceeded to announce his presence again at an open door that was secured by a locked screen door. With no response, Officers Buelow and Bonvicino had a discussion and Officer Bonvicino decided to force entry into the residence, purportedly to make a welfare check on Mr. Hopkins. The total elapsed time from the initial call to the police until the decision to force entry was no more than 11 minutes and 2 seconds. As a result, Officer Bonvicino cut the screen door and opened it, and the two officers went into the house with guns drawn. Officer Bonvicino proceeded with his gun pointed at the floor; Officer Buelow had his gun pointed directly in front of him.

The officers eventually made their way into Mr. Hopkins' room and Officer Bonvicino immediately smelled alcohol. Mr. Hopkins testified that the television was on as well as a lamp. The officers testify it was dark. Officer Bonvicino saw a pair of feet[6], and ordered Mr. Hopkins, who was lying on his back, to show his hands and approach him. Mr.

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[5] Officer Buelow testified that he had been trained that he was only allowed to go onto a person's property "to the gate."

[6] Officer Buelow saw something different. He saw Mr. Hopkins under a blanket in the fetal position.

Hopkins complied. Not fearing for his safety, Officer Bonvicino holstered his gun and approached the compliant Mr. Hopkins to handcuff him. Despite the fact that there was no reason to point his gun at Mr. Hopkins (Officer Bonvicino testified that pointing a gun at Mr. Hopkins would have been "inappropriate"), Officer Buelow continued to point his gun at Mr. Hopkins until Mr. Hopkins was handcuffed. Additionally, and against the clear written policy of the City of San Carlos, Officer Buelow, who was both Officer Bonvicino's and Officer Nguyen's field training officer for a time, expected Officer Bonvicino to document the use of *Officer Buelow's* weapon despite the fact that Officer Bonvicino had no knowledge that Officer Buelow had pointed his gun at Mr. Hopkins. Officer Buelow stated that he trained his recruits that this violation of written policy was acceptable, and that this was a common custom and practice in the San Carlos police department, and that he "never got in trouble for it."

Mr. Hopkins was taken outside and identified by Ms. Talib, and, after being asked by Officer Nguyen if she would like to make a citizen's arrest, she did so. Mr. Hopkins was taken into custody, and eventually arrested for driving under the influence of alcohol and leaving the scene of an accident causing property damage only.

Petitioners had been trained by the City of San Carlos in several relevant areas. They were trained that alcohol intoxication could resemble a diabetic coma, and that the distinction between the two was

that the odor of the breath was different; but, they received no training on the distinction other than the fact that the odor in a diabetic case is "fruity" or "sickeningly sweet". They were further trained that it required further investigation to make the distinction, such as the existence of medical bracelets, listlessness to agitation, confusion, and the like. There was no training on the length of time that an ambulatory person with the "fruity odor" would become emergent or unconscious.

REASONS WHY THE WRIT MUST BE DENIED

I. PETITIONERS HAVE GROSSLY MISCHARACTERIZED THE COURT OF APPEALS' OPINION WHICH SIMPLY APPLIED THIS COURT'S TEST OF REASONABLENESS TO THE FACTS IN THE CONTEXT OF A WARRANTLESS ENTRY INTO A HOME.

A comparison of the Petition with the Opinion leaves the reader scratching his or her head because they seem to bear little or no resemblance to one another. Petitioners seem to be arguing that the Ninth Circuit has overruled the California Supreme Court's opinion in *People v. Thompson*, 38 Cal.4th 811 [135 P.3d 3] (Cal. 2006) on the grounds that *Welsh v. Wisconsin*, 466 U.S. 740 (1984), requires a jailable offense in order to dispense with a warrant. In fact, as this Court has repeatedly made clear, the true test is the *gravity* of the offense at issue as opposed to the penalty, (See, e.g., *United States v. Banks*, 540 U.S.

31, 38, fn. 4 (2006) ["In a different context governed by the Fourth Amendment, we have held that the risk of losing evidence of a minor offense is insufficient to enter a dwelling to make a warrantless arrest. (Citation)"; *Brigham City, Utah*, *supra*, 547 U.S. at 405 ["*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level) – an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. (Citation)"]), and that is exactly the standard the Court of Appeals applied here. (Ex. A to Petition, p. 23a ["To the contrary, in *Welsh, supra,* the Supreme Court held that the exigency analysis must turn on the '*gravity* of the underlying offense,' 466 U.S. at 753 (emphasis added), not its status as 'jailable' or 'non-jailable.'"[7] This Court has supplied a workable standard that has been applied here to an outrageous set of facts.

But most importantly, *this* Petition should be denied on *these* facts because they are simply so

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[7] It is of course acknowledged that this Court concluded that the possibility of jail is an important factor in the calculus. (*Illinois v. McArthur*, 531 U.S. 326, 336 (2001) But this Court went on to make clear in that case that what was at stake was not intrusion into the home but instead "[t]emporarily keeping a person from entering his home. A consequence whenever police stop a person on the street .. [and] .. considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search. (Citation)" (*Ibid.*)

egregious and the conduct of Petitioners was so unreasonable that *any* action by the officers other than further investigation with the reporting party was virtually *per se* unreasonable, and reasonableness is the lynchpin of the Fourth Amendment. As this Court has made clear, and as shown below, if the conduct of the officers was unreasonable, the analysis is at an end.

The Fourth Amendment itself protects against "*unreasonable* searches and seizures . . . " This Court has repeatedly emphasized the requirement of reasonableness.

> "[T]he ultimate touchstone of the Fourth Amendment," we have often said, "is 'reasonableness.'" (Citation) Therefore, although "searches and seizures inside a home without a warrant are presumptively unreasonable", (*Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (internal quotation marks omitted)), that presumption can be overcome. For example, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." (*Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978))

(*Fisher v. Michigan*, ___ U.S. ___, ___ [130 S.Ct. 546, 547] (2009); accord, *Brigham City, Utah*, *supra*, at 402 and cases cited therein.)

The conduct of the Petitioners in this case was anything but reasonable.

Here, Petitioners arrived on-scene and spoke for barely one or two minutes to a person who said she had been involved in a hit and run accident with a drunk driver. But there was *no evidence* that there had been an accident, *no evidence* of any injury or property damage, and *no evidence* that there had even been any driving by anybody. For all the officers knew, the reporting party was a stalker wanting to harass the occupants of a home. Rather than conduct any inquiry, Petitioners knocked on the door of the home and received no response. Rather than ask a single further question regarding this report of an at best low level misdemeanor, Petitioners proceeded to break into Mr. Hopkins' home with guns drawn because they believed he might be suffering from a medical emergency. Should this conduct pass any test of reasonableness, the Fourth Amendment is in reality nothing more than a nullity and the smell of alcohol as reported by a stranger will have legally metamorphosed into the keys to the castle.[8]

Even should this Court be tempted to modify its prior holdings regarding dissipation and/or destruction of evidence as sufficient exigency in a misdemeanor driving under the influence situation, it should resist that urge here because of the facts in *this case*. What differentiates the facts here from the facts of this Court's, as well as other Courts', previous

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[8] "A man's home is his castle." (*Miller v. United States*, 357 U.S. 301, 307 (1958))

rulings, is that Petitioners in this case had not one independent fact from which to make a determination as to whether probable cause existed to arrest Mr. Hopkins, or whether there was any exigency at all.[9]

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[9] For probable cause to exist, the "facts and circumstances within the officer's knowledge (at the time of an arrest)" must be sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." (*Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) Probable cause has been described as a "fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." (*Illinois v. Gates*, 462 U.S. 213, 232 (1983)) A court reviews the events leading up to the arrest and determines if probable cause exists from the standpoint of an objectively reasonable officer. (*Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003)) Additionally, should information come from an informant, the information must come from a citizen who is "unquestionably honest" in order to negate the requirement of some further investigation. (*Illinois v. Gates*, *supra*, at 233-234) Finally, " . . . no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" (*Horton v. California*, 496 U.S. 128, 137, fn. 7 (1990))

This Court has also cautioned that "exceptions to the warrant requirement are 'few in number and carefully delineated'" (*Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984)) An accepted exception to the warrant requirement is if there is a recognized exigency, such as emergency aid. As a result, " . . . law enforcement officers may enter a home to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. (Citations)" (*Brigham City, Utah*, *supra*, at 403) This Court has repeatedly reaffirmed its position in *Welsh*, *supra*, at 754, that a warrantless intrusion into the home for preservation of evidence in a very minor crime violates the Fourth Amendment. (See, e.g., *Banks*, *supra*, at 38, fn. 4 ["In a

(Continued on following page)

First, Petitioners' argument that a victim's report of a crime is presumptively true and thereby creates probable cause is simply incorrect under the facts of this case. Unlike the common case where it is reasonably certain that a crime has been committed, that is not what happened here; far from it. Nothing at the scene would have led any reasonable officer to conclude that *any* crime had occurred other than an unknown person making a report in front of an apparently empty house. That is insufficient to establish probable cause. (See, e.g., 2 LaFave, *Search & Seizure* (4th Ed. 2004), § 3.4(b), fn. 123 and cases cited therein, p. 248) Here, as argued above, there were no indicia that a crime had occurred sufficient to warrant breaking into a home.

Courts, including this one, have made it clear that dispensing with the necessity of a warrant before breaking into a home usually requires some independent knowledge. A review of the facts of a few cases is instructive. In *Brigham City, Utah*, *supra*, at 401, the officers saw juveniles and adults drinking

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different context governed by the Fourth Amendment, we have held that the risk of losing evidence of a minor offense is insufficient to enter a dwelling to make a warrantless arrest. (Citation)"]; *Brigham City, Utah*, *supra*, at 405 ["*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level) – an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. (Citation)"])

and fighting, leading to observed bloodletting. Based upon their observations, it was deemed objectively reasonable that the officers enter. (*Id.* at 406)

In *Thompson*, *supra*, at 815-16, the citizen informant found the defendant passed out in a vehicle. A neighbor woke him up, and asked him to leave. Before he left, the defendant stumbled about and threw away an empty vodka bottle. The defendant passed out again, and the informant knew he was intoxicated; she had seen him this way several times before. She followed the defendant and called "911". She saw him run a red light, drive above the speed limit, and weave in traffic, coming very close to a concrete barrier. He ran through several stop signs and drove too fast in a neighborhood with children present. The police arrived, got the license number, and drove to the owner's home, where the officer found the vehicle. The hood was still warm. The officers approached the home and rang the doorbell. The person who answered the door, when asked by the police who had been driving, responded that the defendant owned the vehicle. She said the defendant was asleep, and, when asked if he could be awakened, she went back to a room next to the front door, stayed there awhile, and said the defendant could not be awakened. She refused entry to the officers, but also left the door wide open.

The officers heard talking down the hall, and then saw a shirtless man who matched the description of the driver leave the house and go into the backyard. When the man made eye contact with the

officer, he was motioned to the front door, and he came. The officers saw that the man was staggering and slurred his speech, and smelled strongly of alcohol. When the officer explained his presence and purpose, the defendant refused to cooperate. As he walked away, the officer entered the home through the open door and grabbed him.

In contrast to this case, the defendant in *Thompson, supra*, had been seen driving dangerously, and he had been seen passed out and with a liquor bottle. The officers saw the defendant themselves and were able to corroborate his state of sobriety and, by feeling the hood, were able to determine that the vehicle had been driven very recently. The defendant's expectation of privacy was also diminished because he voluntarily spoke with the officers and the front door was always open. The intrusion was minimal since the officer only went a few feet over the threshold. The court found the intrusion especially minimal because the police never went anywhere that was not already exposed to public view and did need to make a forced entry. (*Id.* at 828)

The factual distinctions from this case are not without import. In this case, the officers made no independent observations and, as shown above, in reality they had no information upon which an objectively reasonable police officer could rely before taking the monumental step of making a warrantless intrusion into a home. And, contrary to the pleading of Petitioners, this Court has outlined a clear and workable standard under the Fourth Amendment,

namely objective reasonableness. This Court cannot and should not be expected to weigh in on the virtually infinite number of factual scenarios that police officers face in the performance of their duties, and certainly not in a situation such as this one where the officers can only be kindly said to have gotten "creative" in their duties.

The Petition must be denied.

II. THE PETITION MUST BE DENIED WITH RESPECT TO THE EXCESSIVE FORCE CLAIM BECAUSE AT A MINIMUM IT IS PREMATURE

Petitioners finally argue that Officer Buelow is entitled to qualified immunity for pointing his gun at Mr. Hopkins after Officer Bonvicino determined that there was no reason to do so and that it would have been inappropriate to have pointed a gun at him. Their argument is, among others, that since Officer Bonvicino did not testify that it was inappropriate for *Officer Buelow* to have pointed his weapon at Mr. Hopkins that this evidence is somehow irrelevant. But the reality is that this testimony created a triable issue of fact, thereby precluding a finding of qualified immunity at the procedural stage of the case, namely summary judgment.

Petitioners also make the legal gaffe of citing cases such as *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) which predate and have been superseded by *Graham v. Connor*, 490 U.S. 386, 394-95 (1989). The

citation to *Los Angeles County, California v. Rettele*, 550 U.S. 609 (2007), is curious, because in that case this Court reaffirmed the basic Fourth Amendment standard, discussed above, of *reasonableness*. (*Id.* at 614) This Court went on to explain that "[t]he Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach." (*Ibid.*) But here, as pointed out above, Officer Bonvicino determined that it was "inappropriate" to point a gun at Mr. Hopkins, and, at trial, a factfinder might well find it unreasonable for Officer Buelow to continue to point his gun at Mr. Hopkins after it was determined that Mr. Hopkins posed no threat of any kind. Certainly a court, based upon a cold record, cannot make that determination, especially when a trained professional on scene at the time had the courage to testify that what a colleague did was essentially wrong. The Court of Appeals relied on its 2002 decision of *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir. 2002), which has been cited in excess of 250 times and criticized but once, in which it was held that "pointing a gun to the head of an apparently unarmed suspect during an investigation *can* be a violation of the Fourth Amendment, especially where the individual poses no danger" (emphasis added), yet Petitioners exhume authority from the 1980's in order to make a claim of qualified immunity. The Court of Appeals made an accurate statement of the law, and it was clearly established, and Petitioners' attempts to resurrect the ghosts of the past do not create a conflict leading to qualified immunity. Therefore, at this stage of the

litigation, review by this Court would be inappropriate.

The Petition must be denied.

CONCLUSION

Bruce Hopkins respectfully requests that for the reasons stated above that this Petition for Writ of Certiorari be denied.

Respectfully Submitted,

ANTHONY BOSKOVICH
BOSKOVICH & APPLETON
28 N. First Street, 6th Floor
San Jose, California 95113-1210
(408) 286-5150
policemisconduct@compuserve.com

Attorney for Respondent Bruce Hopkins